(8) (11) (6) (3) (5)

Nos. 87-1589, 87-1888, 87-1911, 87-2049 and 88-464

Supreme Court, U.S.
FILED
NOV 18 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PITTSBURGH & LAKE ERIE RAILROAD COMPANY,
Petitioner,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Respondents.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Petitioners,

v.

GUILFORD TRANSPORTATION INDUSTRIES, INC., *et al.*,
Respondents.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Petitioners,

v.

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Courts of Appeals for the First, Third, Seventh and Eighth Circuits

---

SUPPLEMENTAL BRIEF FOR RAILWAY LABOR EXECUTIVES' ASSOCIATION

WILLIAM G. MAHONEY
JOHN O'B. CLARKE, JR.*
HIGHSAW & MAHONEY, P.C.
Suite 210
1050 17th Street, N.W.
Washington, D.C. 20036
Attorneys for Railway Labor Executives' Association

Date: November 18, 1988 * Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

® 80

1317

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
1. OVERVIEW OF PENDING CASES	2
A. Collateral Attack Issues	2
B. Conflict Of Laws Issues	6
C. Railway Labor Act Issues	7
D. Norris-LaGuardia Act Issue	8
2. RECENT EVENTS AFFECTING NO. 87-1911	9
CONCLUSION	10

TABLE OF AUTHORITIES

CASES RELIED UPON: Page

Brotherhood of Locomotive Engineers v. Boston & Maine Corp., 788 F.2d 794 (1st Cir.), *cert. denied*, 479 U.S. 829 (1986) 3

Ex Parte No. 282 (Sub-No. 9), Railroad Consolidation Procedures—Trackage Rights Exemption, 1 I.C.C.2d 270 (1985) 4

Railway Labor Executives' Association v. Pittsburgh & Lake Erie Railroad Company, 845 F.2d 420 (3rd Cir. 1988), *pets. for cert. pending*, Nos. 87-1888 and 88-217 6

Railway Labor Executives' Association v. Staten Island R.R., 792 F.2d 7 (2d Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987) 2

STATUTES AND OTHER MATERIALS:

Interstate Commerce Act, 49 U.S.C. § 10101, *et. seq.* 2, 6, 8

Section 10505, 49 U.S.C. § 10505 4

Section 11341(a), 49 U.S.C. § 11341(a) 4

Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.* 8

Railway Labor Act, 45 U.S.C. § 151, *et seq.* ..... *passim*

Rules of the Supreme Court

Rule 22.6 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

Nos. 87-1589, 87-1888, 87-1911, 87-2049 and 88-464

PITTSBURGH & LAKE ERIE RAILROAD COMPANY,
Petitioner,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Respondents.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Petitioners,

v.

GUILFORD TRANSPORTATION INDUSTRIES, INC., *et al.*,
Respondents.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Petitioners,

v.

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Courts of Appeals for the First, Third, Seventh and Eighth Circuits

---

SUPPLEMENTAL BRIEF FOR RAILWAY LABOR EXECUTIVES' ASSOCIATION

This supplemental brief is respectfully submitted by the Railway Labor Executives' Association [hereinafter, "RLEA"], pursuant to Rule 22.6 of the Rules of this Court, to present an overview of the pending petitions,

and in response to certain arguments made by the United States as an *amicus curiae* in Nos. 87-1589 and 87-1888, *Pittsburgh & Lake Erie R.R. v. RLEA*. This brief is also being submitted to bring to this Court's attention certain recent developments affecting No. 87-1911, *RLEA v. Guilford Transportation Industries, Inc.*

1. OVERVIEW OF PENDING CASES

Since March 24, 1988, when the petition for a writ of certiorari was filed in No. 87-1589, *Pittsburgh & Lake Erie R.R. v. RLEA*, a total of eight (8) petitions have been filed with this Court seeking writs of certiorari for this Court to review various issues arising from the rail industry's reliance upon the powers of the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] over rail financial transactions, to assert that the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*, relieves our nation's railroads of their bargaining and status quo obligations under the Railway Labor Act, 45 U.S.C. § 151, *et seq.* While those petitions raise many different issues, RLEA, which is a party to each case, submits that the cases may be grouped into the following four categories by the issues which they present.

A. Collateral Attack Issues

Although the railroads have asserted throughout this litigation that the Interstate Commerce Act operates to relieve them of any "overlapping" obligation under the Railway Labor Act, the courts first relied upon the collateral attack concept to deny rail labor's efforts to enforce the Railway Labor Act's notice, bargaining and status quo commands. *E.g., RLEA v. Staten Island R.R.*, 792 F.2d 7 (2d Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987). That collateral attack issue is currently before this Court in five (5) of the eight petitions: No. 87-1888, *Pittsburgh & Lake Erie R.R. v. RLEA*; No. 87-1911, *RLEA v. Guilford Transportation Industries, Inc.*; No. 87-2049, *RLEA v. Chicago & North Western Transpor-*

tation Co.; No. 88-217, *ICC v. Pittsburgh & Lake Erie R.R.*; and No. 88-517, *City of Galveston v. RLEA.*

Of those five cases, RLEA submits that the *Guilford* case presents the best vehicle, for *Guilford* presents the collateral attack issue in a factual situation where the ICC imposed employee protections which the carriers asserted specifically authorized them to consummate the leases, notwithstanding the bargaining and status quo commands of the Railway Labor Act. *See, BLE v. Boston and Maine Corp.*, 788 F.2d 794, 800-01 (1st Cir.), *cert. denied*, 479 U.S. 829 (1986). This case, therefore, presents not only the general collateral attack issue which arises when rail labor seeks to enforce the Railway Labor Act in cases involving ICC orders exempting a financial transaction, but the additional question of whether the imposition of employee protections requires a different result. This additional issue is highly relevant because some courts have relied upon the presence of ICC imposed protective conditions to conclude that enforcement of the Railway Labor Act's major dispute resolution processes would constitute a collateral attack on an ICC decision imposing specific conditions to protect employee interests. *BLE v. Boston and Maine Corp.*, *supra*, 788 F.2d at 800-02; *see*, ICC Pet. in No. 88-711 at 14-15. Thus, if this Court resolves the collateral attack issue presented by the pending petitions in a manner favorable to rail labor, but in a case in which employee protections were not imposed by the ICC, it is safe to assume that the ICC will then impose some minimal form of protection, such as the limited buyout offer involved in No. 88-464, *RLEA v. Chicago & North Western Transportation Co.*, and the courts will then be faced with the question of whether that fact makes enforcement of the Railway Labor Act a collateral attack on that ICC order.

In short, since the goal which the parties to the pending petitions are attempting to obtain is the final reso-

lution of as many vexing issues as possible, RLEA respectfully submits that *Guilford* should be one of the cases accepted for review.

In its brief to this Court as an *amicus* in Nos. 87-1589 and 87-1888, however, the United States asserts that it disagrees with RLEA that the *Guilford* case should be used as a vehicle to resolve any of the pending issues. U.S. Brief at 9 n.8. The United States takes that position because it assumes that the transactions in *Guilford* are subject to the express immunity granted by 49 U.S.C. § 11341(a) that, according to the Solicitor General, relieves a carrier participating in such "approved or exempted" transactions from any restraining or prohibitory law. *Id.* As the United States concludes: "Thus, the principles that govern transactions subject to Section 11341 are not necessarily applicable to transactions subject to Section 10901 and the *Ex Parte No. 392* class exemption." *Id.*

In asserting that Section 11341(a) applies to the lease *exemptions* involved in *Guilford*, the United States ignores the fact that Section 11341(a), by its express terms, applies only to "transaction[s] approved by or exempted by the Commission under this subchapter [*i.e.*, Sections 11341 to 11351] . . . ." 49 U.S.C. § 11341(a). Rail exemptions, such as those involved in *Guilford*, are granted under Section 10505, a section which is in an entirely different subchapter of the transportation statute. Moreover, as RLEA pointed out in its petition in No. 87-1911 (Pet. at 22-23), the import of the clear language of Section 11341(a) is supported by that section's legislative history, and by the ICC's holding in *Ex Parte No. 282 (Sub-No. 9), Railroad Consolidation Procedures—Trackage Rights Exemption*, 1 I.C.C.2d 270, 279 (1985), that: "[S]ection 11341(a) does not apply to the [Section 11343(a)] transactions exempted" under Section 10505.

Once it is accepted that Section 11341(a) does not apply to the lease exemptions in *Guilford*, that case then

presents the same collateral attack and conflict of laws issues as are involved in the other cases, except, as explained above, it has the additional feature of the impact of ICC imposed protections on both issues. Therefore, RLEA submits, Guilford should be used as one of the vehicles to resolve both the collateral attack and conflict of laws issues.

RLEA recognizes, however, that the possibility exists that this Court may not agree with RLEA's view of the law on the collateral attack issue, and therefore, RLEA agrees with the rail industry that at least one of the other pending collateral attack cases should also be accepted for review in the event that this Court concludes that the presence of employee protective provisions requires a different result than RLEA is advocating. As we have explained before, RLEA submits that its petition in No. 87-2049, *RLEA v. Chicago & North Western Transportation Co.*, should be that additional vehicle.

No. 87-1888 also presents a good vehicle for the non-employee protection collateral attack issue, but it suffers from one major defect.[1] Rail labor has been involved in negotiations with the Pittsburgh & Lake Erie Railroad [hereinafter, "P&LE"] and its creditors in an attempt to find a solution to the carriers' financial plight. So far, those negotiations have been unsuccessful. However, as shown by the letter to counsel for RLEA from RLEA's financial advisor, Mr. Brian M. Freeman, which has been lodged with this Court, it is possible that those efforts will be successful in the near future. A successful resolution of the current negotiations may include as part of the agreement the commitment of all parties (including RLEA and the P&LE) to dismiss "with prejudice" "all

[1] As explained below, RLEA's hesitancy to recommend the grant of the petition in No. 87-1888 lies in the possibility that the parties may agree to settle before this Court reaches a decision on the merits. That possibility, however, is far from a certainty, and, thus, this Court may wish to grant the petition in No. 87-1888, as well, for concurrent briefing with Nos. 87-1911, 87-2049, and 88-464.

actions brought by Rail [*sic*] Labor Executives' Association ('RLEA') against PLE relating to the sale of PLE's assets . . . ." Freeman letter dated November 14, 1988 at attachment, p. 9, ¶(g).

It was for this reason that RLEA stated in its response to the P&LE's petition in No. 87-1888, that "there is a substantial question as to whether this case will still present a justiciable issue later this year or early next year." RLEA Brief in No. 87-1888 at 5.[2] While RLEA continues to question whether this case will remain viable, we agree that it is currently justiciable. However, while RLEA has a clear interest in continuing to press the validity of the Third Circuit's decision, RLEA also has an obligation to the P&LE rail employees which may require it to agree to dismiss its underlying complaint as a condition for an overall settlement. That same possibility does not exist in No. 87-2049 or in No. 87-1911.

In short, on the collateral attack issue, RLEA suggests that this Court grant the petitions in Nos. 87-1911 and 87-2049, and that this Court hold Nos. 87-1888 and 88-517 in abeyance. *But see*, note 1, *supra*. RLEA continues to maintain that No. 88-217 should be denied.

B. Conflict Of Laws Issues

RLEA respectfully submits that the issue which lies at the heart of the pending cases, although it is not presented in each petition, is the question of whether the Interstate Commerce Act supersedes the Railway Labor Act. That issue is squarely presented by five of the peti-

[2] In its brief (U.S. Brief at 9 n.8), the United States asserts that RLEA has suggested that No. 87-1888 may become moot because the P&LE no longer intends to sell to its original prospective purchaser, P&LE Railco, Inc. That assertion is incorrect, for RLEA has contended before, and continues to assert, that this case (No. 87-1888) will not be moot so long as the P&LE may sell its assets before it has completed the Railway Labor Act's major dispute resolution processes. *See, RLEA v. P&LE*, 845 F.2d 420, 427-28 n.8 (3rd Cir. 1988), *pets. for cert. pending*, Nos. 87-1888 and 88-217.

tions: No. 87-1888, *P&LE v. RLEA*; No. 87-1911, *RLEA v. Guilford*; No. 87-2049, *RLEA v. Chicago & North Western*; No. 88-217, *ICC v. P&LE*; and No. 88-711, *ICC v. UTU*. Of those five cases, Nos. 88-217 and 88-711 do not merit review by this Court since the ICC, which is the petitioner in both, lacks standing. Of the remaining three, RLEA again suggests that Nos. 87-1911 and 87-2049 be used as the test vehicles.

C. Railway Labor Act Issues

Running throughout virtually all of these cases is the question of what specific Railway Labor Act obligations are presented and believed by the rail carriers to be in conflict with the Interstate Commerce Act. Only two of the pending cases, besides the ICC's petition in No. 88-217, present that question: No. 87-1888, *P&LE v. RLEA*, and No. 88-464, *RLEA v. Chicago & North Western Transportation Company*. However, a primary distinction between those two cases is that the *Chicago & North Western* case deals with a sale of part of a railroad, and thus, does not present the same bargaining issue which arises from the fact that the *P&LE* case involves a railroad's attempt to go completely out of the railroad business.[3] While RLEA submits that this fact should not make any difference, the Seventh Circuit in the *Chicago & North Western* case concluded that this was a distinguishing factor. *See*, No. 88-464, Pet. at 16a-17a n.3. Thus, if this Court is to resolve as many issues as possible so that rail labor and management will know what their rights are in line sale cases, this Court should grant the petition in No. 88-464.

Another reason for granting the petition in No. 88-464 is that this case is the only one of the eight petitions which squarely presents the recently prevalent "minor

[3] It should be noted that the P&LE did not intend to dissolve, but simply to sell its rail lines and facilities and remain viable as a rail car leasing and real estate entity.

dispute" question. Since the contractual provisions upon which the C&NW relied in No. 88-464 to argue that the underlying controversy was a minor dispute, are common contractual provisions throughout the entire rail industry (*see*, RLEA Reply Brief in No. 88-464 at 6 n.1), it stands to reason that other carriers will advance an identical minor dispute defense in line sale cases. Indeed, this has already occurred, for in the two remaining district court cases arising from line sales, the carriers have raised that identical argument. One case is still pending, *RLEA v. Burlington Northern R.R.*, W.D.Mo. Civil Action No. 87-0696-CV-W-8, but in the other, the court relied upon the Seventh Circuit's *Chicago & North Western* decision to conclude that rail labor's claims raised only a minor dispute, even though Section 6 notices had been served by several unions. *Atchison, Topeka & Santa Fe Ry. v. RLEA*, N.D.Ill Civil Action Nos. 87 C 9847 and 87 C 9969, decided October 25, 1988.

A resolution of the question presented as to the scope of the status quo obligation is important to the conflict of laws issue. This is so because, obviously a conclusion that a carrier has an obligation to bargain over the effects of a sale on its employees, but that it is not precluded by the Act's status quo obligation from selling during that bargaining process, presents a different conflict issue than would be presented by the conclusion that the status quo obligation *does* preclude the sale before that bargaining is completed. Since No. 88-464 presents this issue, RLEA submits that the writ should be granted in that case.

D. Norris-LaGuardia Act Issue

Two of the pending cases present the additional issue of the relationship between the Interstate Commerce Act and the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.* Those cases are: No. 87-1589, *P&LE v. RLEA*, and No. 88-711, *ICC v. UTU*. One of those cases, *ICC v. UTU*, does not present a case over which this Court has juris-

diction, and the other case suffers from the possible settlement problems inherent in No. 87-1888. RLEA has previously suggested that this Court hold No. 87-1589 in abeyance, and it continues to make that suggestion for the reasons set forth in its response to No. 87-1589.

2. RECENT EVENTS AFFECTING NO. 87-1911

In its earlier supplemental briefs in No. 87-1911, RLEA informed this Court that on June 12, 1988, an arbitrator issued an award which may affect the continued justiciability of No. 87-1911. That award—the Implementing Agreement award—is the subject of a review petition before the ICC. On November 15, 1988, the ICC conducted a public voting conference on that petition, and three of the five Commissioners voted to set aside that award insofar as it required the Springfield Terminal Railway Company to apply the rates of pay and work rules of the lessor carriers to the employees operating the leased lines. According to the statements made by the Commissioners at the voting conference,[4] they voted to set aside that portion of the award because the arbitrator's award limited the "management flexibility" which Guilford had hoped to achieve by the leases. As RLEA explained in its Supplemental Brief of September 30, 1988, at 4-5, that management flexibility was to be achieved through the abrogation of the lessors' collective bargaining agreements. However, rather than impose the Springfield Terminal work rules, the ICC voted to require the parties to negotiate, with the arbitrator acting as a mediator, the issue of the proper construction of the Springfield Terminal-United Transportation Union collective bargaining agreement, and the issue of what work rules should govern the lease operations. If the parties are unable to agree, then the "arbitrator"

---

[4] RLEA has ordered a transcript of the voting conference and once it is obtained (at present, it is scheduled to be delivered on Monday, November 21, 1988), RLEA will lodge it with this Court.

is to submit to the Commission a recommended decision on those issues which the ICC will then review to devise the new collective bargaining "agreement." RLEA recognizes, however, that the full import of what the Commission will order in that case will not be known until it issues it written decision and order.

CONCLUSION

For the reasons set forth in RLEA's earlier pleadings, RLEA respectfully submits that this Court should grant the petitions in Nos. 87-1911, 87-2049 and 88-464.

Respectfully submitted,

WILLIAM G. MAHONEY
JOHN O'B. CLARKE, JR.*
HIGHSAW & MAHONEY, P.C.
Suite 210
1050 17th Street, N.W.
Washington, D.C. 20036
Attorneys for Railway Labor Executives' Association

Date: November 18, 1988

* Counsel of Record